ECORD
AND
BRIEFS

No. 15-1509

IN THE

Supreme Court of the United States

U.S. BANK NATIONAL ASSOCIATION, TRUSTEE, ET AL. BY AND THROUGH, CWCAPITAL ASSET MANAGEMENT LLC, SOLELY IN ITS CAPACITY AS SPECIAL SERVICER,

Petitioner,

v.

THE VILLAGE AT LAKERIDGE, LLC,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

GREGORY A. CROSS*
MITCHELL Y. MIRVISS
VENABLE LLP
750 East Pratt Street,
Suite 900
Baltimore, MD 21202
gacross@venable.com
(410) 244-7400

KEITH C. OWENS
JENNIFER L. NASSIRI
VENABLE LLP
2049 Century Park E.,
Suite 2300
Los Angeles, CA 90067
(310) 229-9900

**Counsel of Record*
Counsel for Petitioner

275559

COUNSEL PRESS

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Petitioner U.S. Bank[1] replies to the brief ("Resp't Br.") of Respondent Village at Lakeridge, LLC and the brief ("Gov't Br.") of *amicus curiae*, the United States (the "Government") (collectively, "Respondents").

OVERVIEW

Respondents see the question presented by mixed fact-and-law cases as quite simple. In their view, all that is needed is a routine, binary analysis: facts are facts, and law is law, so the courts should determine whether the issue is factual or legal and decide accordingly whether to apply *de novo* or clear-error review. *See* Gov't Br. 10 (stating that, "[a]lthough a particular question may contain both legal and factual components, . . . the appropriate course" is to "'separate factual from legal matters'" and apply deferential or *de novo* review accordingly) (quoting *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 839 (2015)). A century of jurisprudence and scholarship says otherwise. Mixed questions of fact and law have divided the circuits and bedeviled courts and scholars precisely because they defy such easy answers. *See, e.g.*, *Pullman-Standard v. Swint*, 456 U.S. 273, 288, 289 n.19 (1982) (noting the "vexing" and "much-mooted issue of the applicability of the Rule 52(a) standard to mixed questions of law and fact"). A simplistic, binary approach does not work because issues often have both factual and legal aspects.

In order to depict the issue here as quintessentially factual, Respondents mischaracterize the test for

1. Capitalized terms and terms bracketed by quotation marks have the same meaning as in Petitioner's opening brief.

determining "non-statutory insider" status as focusing on subjective intent and motive. Resp't Br. 23, Gov't Br. 18. In doing so, they conflate separate provisions of the Bankruptcy Code. Intent and motive are not elements of the applicable test for determining non-statutory insider status. Instead, they are elements for determining bad faith under *different* provisions of the Bankruptcy Code. *See* 11 U.S.C. §§ 1126(e) and 1129(a)(3) (set forth at Resp't Br. 4-5). The Bankruptcy Court rendered its finding on bad faith in a *separate* ruling that is not before this Court. In other words, Respondents rely on a flawed, misplaced analysis.

Respondents also downplay the core normative aspects of an "arm's length" determination. Under the Ninth Circuit's test, the term "arm's length" refers to a transactional *status*, not the parties' states of mind. It is determined by examining objective normative factors such as bargaining history and exercise of due diligence, yet Respondents never address these factors. They also never explain why the Ninth Circuit's test should be thrown into a mixture of criteria that will vary from court to court and judge to judge. For example, Lakeridge asserts that the "standard" for determining arm's length is "fixed and straightforward," Resp't Br. 21, but it never shows why that is so. The Government likewise asserts that the only open issues are case-specific questions of historical fact as to *"[w]hether* a transaction was arm's length," Gov't Br. 19 (emphasis added), rather than "*when* a transaction is arm's length," and it, too, fails to explain why that is so. Notably, Respondents never explain why, if non-statutory insider status is purely factual, the Bankruptcy Court had to scan rulings by other courts to glean the common determinative factors.

At bottom, Respondents misapprehend Petitioner's argument, insisting that Petitioner seeks *de novo* review of all subsidiary or historical fact findings. *See* Resp't Br. 18; Gov't Br. 13, 19. Not so. The issue is whether the Bankruptcy Court's selection of the *relevant factors* for determining non-statutory insider status (*e.g.*, whether cohabitation or commingling of finances are foremost considerations) is normative and therefore reviewed *de novo*. If the issue were factual, it would focus on historical questions such as whether Rabkin and Bartlett were romantically involved but not cohabitating; whether they were or were not sharing finances; or even "[w]hat was [their] motivation and intent?" Resp't Br. 21. The question here, however, is quite different: it addresses whether these factual issues are relevant, *i.e.*, how "arm's length" should be determined.

Determining the legal significance of those facts as they relate to insider status is principally a legal question, not one of historical fact. Respondents never refute the point that selection of the relevant factors for applying a broad standard like "arm's length" is normative and must be reviewed *de novo* to achieve consistency of application.

As for the broader question of how mixed questions of fact and law should be handled, Respondents treat it as a binary, Manichean question of fact or law and ignore the wide middle ground in which relevant factors have not yet been fleshed out by case law. The "functional" analysis strongly favors *de novo* review as to those factors because uniformity of decisions is paramount, and consistency in determining the relevant factors cannot be achieved without *de novo* appellate review. This is especially true in bankruptcy law, where the Constitution mandates uniform

laws. As the "seaman" cases demonstrate, this Court has long held that *de novo* review is required to prevent inconsistent applications of a broad statutory standard with subsidiary unresolved factors.

Finally, Respondents badly misgauge the stakes. Wide disparity as to non-statutory insider status is not tenable: it invites a legal landscape where preferences and fraudulent transfers are voidable in some courts but not in others, and where, as here, plan confirmation depends more on the selection of forum than on compliance with the Bankruptcy Code. Indeed, if *de novo* review is not available for mixed questions like this, inconsistency will reign in many statutory schemes. This Court should follow its precedents and require *de novo* review.

ARGUMENT

Part I of the Argument addresses Respondents' arguments that the statutory question here is factual. Part II addresses Respondents' arguments concerning the broader question of how courts should analyze mixed questions of fact and law. Part III addresses Respondents' arguments on impact and policy.

I. Respondents Fail to Show That Determining Non-Statutory Insider Status Is Factual.

A. Intent Is Not Part of the Ninth Circuit Test for Determining Whether a Transaction Was Conducted at Arm's Length.

Respondents contend that non-statutory insider status is a factual question because the determination focuses on

the parties' intent, and intent is a quintessential factual matter. The Government analogizes to a bankruptcy court's dismissal of a petition for "cause" under 11 U.S.C. §§ 707(a), 1112(b)(4), and 1307(c), where deferential review is required if bad faith is found. Gov't Br. 14. It then argues that, because a "determination [as to] whether two parties bargained at arm's length turns on the parties' *motivations*," the issue must be factual. *Id.* at 18 (emphasis in original). Lakeridge agrees: "A claimholder's motivation will be central to whether he acted at arm's length." Resp't Br. 23. Respondents' "factual" argument rests on this contention.

Respondents' intent-based standard is an invention of appellate convenience. Lakeridge does not cite any authority; its argument is pure *ipse dixit*. *See* Resp't Br. 23. The Government, by contrast, quotes (i) the current *Black's Law Dictionary* definition adopted by the Ninth Circuit below, Pet. App. 13a n.11 (the operative definition for this appeal), which *does not mention intent or motivation*;[2] (ii) a minor footnote in a Tenth Circuit decision quoting an old, superseded *Black's* definition that mentions good faith;[3] (iii) a Fifth Circuit decision addressing a Texas *state-law* fraudulent conveyance

2. This quoted *Black's* definition defines "arm's length" as "[a] transaction . . . conducted as if the parties were strangers, so that no conflict of interest arises." *Transaction*, BLACK'S LAW DICTIONARY (10th ed. 2014). The focus is on conduct, not subjective intent and good faith.

3. *Anstine v. Carl Zeiss Meditec AG (In re U.S. Med., Inc.)*, 531 F.3d 1272, 1277 n.4 (10th Cir. 2008) (quoting *Black's Law Dictionary* (6th ed. 1990)). The decision never actually considers intent, motive, or bad faith in its analysis of whether the transaction was made at arm's length.

statute, *not the Bankruptcy Code*;[4] and (iv) an immaterial *tax* decision.[5] Gov't Br. 17-18. Indeed, contradicting the Government's premise, the Tenth and Fifth Circuit decisions *both* apply *de novo* review, *not* deferential review. *See U.S. Med.*, 531 U.S. at 1275 ("[W]e have a mixed question of law and fact where the legal analysis predominates. Our review is therefore de novo.") (internal citation omitted); *Holloway*, 955 F.2d at 1012 ("[We] give our careful scrutiny to the subject transactions.").

Neither the Bankruptcy Court nor the Panel majority below focused on intent. The findings cited by Lakeridge (Resp't Br. 25) were made in a subsequent, *different* ruling when the Bankruptcy Court addressed *separate grounds* for rejecting the cramdown plan under a bad-faith test in 11 U.S.C. § 1126(e). *Compare* Pet. App. 66a-67a (insider-status ruling) *with* Pet. App. 67a (no bad-faith ruling). The Ninth Circuit also addressed bad faith in a separate unreported decision. Pet. App. 6a n.6. The lack of an intent requirement for "arm's length" also distinguishes

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4. *Browning Interests v. Allison (In re Holloway)*, 955 F.2d 1008, 1013-1014 (5th Cir. 1992). The decision uses the term "commercial motivation" to address whether a transaction is commercially reasonable—an objective fact that does not involve subjective intent.

5. The Government miscites a 1945 *tax* decision as having ruled that, "for purposes of the gift tax, a transaction 'at arm's length' is 'free from any donative intent.'" Gov't Br. 18 (quoting *Comm'r v. Wemyss*, 324 U.S. 303, 306 (1945)). *Wemyss* merely quoted a Treasury regulation referring to a "'transfer of property made in the ordinary course of business (a transaction which is bona fide, at arm's length, ***and*** free from any donative intent).'" *Id.* (emphasis added, citation omitted). Intent thus was *not* an element of "arm's length" in *Wemyss*.

this case from the "cause" cases cited by the Government. Gov't Br. 14.[6]

Finally, Respondents conspicuously ignore the Ninth Circuit definition of "arm's length" (the current *Black's* definition) that nowhere mentions intent. *See* Pet. App. 13a n.11; *see also* n.2, *supra*. No circuit recognizes intent as a relevant, let alone predominant, element of the Bankruptcy Code test for "arm's length." This lack of case law illustrates perfectly why *de novo* review is required. A decision that intent is relevant cannot be left to trial-court discretion, such that intent is relevant in some courtrooms but not in others. This is a legal determination, and the appellate courts need plenary-review authority to ensure legal consistency.

B. Respondents Ignore the Normative Aspects of "Arm's-Length" Status.

The general test that non-statutory insider status refers to non-arm's-length transactions by parties in close relationships derives from one cryptic sentence in the statute's legislative history. Respondents cite the legislative history as if it were a substitute for applying the statute, *i.e.*, as if "closeness" and "arm's length" supplant "insider status." They do not; instead, they are legal measures used to determine the existence of insider status. If additional analysis is needed to determine their parameters, that analysis is legal, not factual. As Justice Thomas summarized the principle, "[i]n general, we have

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6. As much as Petitioner disagrees with the lower courts' findings of good faith, that factual determination is not at issue here.

treated district-court determinations as 'analytically more akin to a fact' the more they pertain to a simple historical fact of the case, and as 'analytically more akin to . . . a legal conclusion' the more they define rules applicable beyond the parties' dispute." *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 845 (2015) (Thomas, J., dissenting) (quoting *Miller v. Fenton*, 474 U.S. 114, 116 (1985)).

Just because an issue is subsidiary to the insider "test" does not make it factual. The character of an issue, not its location on a hierarchical ladder, decides whether the issue is predominantly legal or factual. Here, "close relationship" and "arm's length" are themselves normative components of non-statutory insider status. Unlike intent, they are not subjective, but, rather, characterize an objective state or condition that applies uniformly to a group sharing discrete common characteristics. Those characteristics are objective norms that typically are treated as quasi-legal and reviewed *de novo* to ensure consistency of application. For example:

- **ERISA fiduciary status**: *LoPresti v. Terwilliger*, 126 F.3d 34, 39 (2d Cir. 1997) (agreeing with other circuits that "'[t]he existence of a fiduciary relationship under ERISA, on the merits, is a mixed question of law and fact'" and applying *de novo* review) (citations omitted).

- **Employee status under FLSA**: *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988) ("review of the ultimate question of employment status is *de novo*") (citations omitted).

- **Employee status under the Jones Act**: *Evans v. United Arab Shipping Co. S.A.G.*, 4 F.3d 207, 213 (3d Cir. 1993) ("employer-employee status is sometimes, as here, a mixed question of law and fact" and district court's selection of the standard by which employment status is judged is reviewed *de novo*).

- **Borrowed employee status under the LHWCA**: *Gaudet v. Exxon Corp.*, 562 F.2d 351, 358 (5th Cir. 1977) ("the issue [of whether a worker is a borrowed employee under the LHWCA] is best considered an issue of law").

- **American Indian status under 18 U.S.C. § 1152**: *United States v. Bruce*, 394 F.3d 1215, 1218 (9th Cir. 2005) (holding that determination of victim's American Indian status is a mixed question of law and fact reviewed *de novo*).

The Government agrees that appellate courts should decide "'the norms and standards that give meaning'" to a statutory test. Gov't Br. 16 (quoting Pet'r's Br. 47). Thus, even under the Government's view, the determination of whether co-habitation or commingling of finances should govern whether a transaction is "arm's length" or a relationship is "close" is quasi-legal because it ascribes norms for distinguishing among diverse facts. Because the determination of whether a transaction is "arm's length" requires more than simply answering the "who, what, when, and why" of the transaction, *see* Resp't Br. 23, that determination is normative, not factual. In other words, where the question addresses what "implications [may] be drawn from the facts," and not just what are the facts, *de novo* review should be applied. *Gaudet*, 562 F.2d at 358.

C. Respondents Mischaracterize the Bankruptcy Court's Decision.

Respondents misinterpret the Bankruptcy Court's explanation of its ruling. The Bankruptcy Court stated that it had reviewed other court decisions, identified five pertinent factors (including cohabitation and commingling of finances), and found them all lacking here. J.A. 153-154. This is the epitome of developing and applying a legal test.

Each factor identified by the Bankruptcy Court goes to measuring the "closeness" of Rabkin and Bartlett's personal relationship, not to applying the Ninth Circuit "arm's-length" test of whether the transaction was conducted as if the parties were strangers. Deciding whether Rabkin and Bartlett cohabitated or shared finances does not bear on whether they conducted their transaction as if they were strangers, raising a *legal* question as to whether the Bankruptcy Court applied the Ninth Circuit test.[7]

In response, Respondents argue that (i) the Panel majority found that the Bankruptcy Court adequately explained why the transaction was arm's length and the Panel majority would have reversed had the wrong standard been applied; (ii) the Bankruptcy Court identified the five factors merely as relevant facts and did not create a legal test; (iii) the Bankruptcy Court considered other factors, such as intent; and (iv) the Panel majority distinguished between legal issues, which it

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7. The Bankruptcy Court referenced these as "relationship" factors, suggesting that they were intended to apply to the "closeness" test, not the arm's-length test. J.A. 153.

reviewed *de novo*, and factual issues, which it reviewed for clear error. Resp't Br. 24-25; Gov't Br. 24-27. The record says otherwise: the Panel majority never explained how these five "facts" met the Panel majority's definition of arm's length, and it expressly applied clear-error review, not *de novo* review, to the Bankruptcy Court's ruling. *See* Pet. App. 16a.

The Bankruptcy Court was transparent regarding its analysis. To reiterate, when the court took the bench to announce its decision, it stated:

> The cases that have found non-statutory insiders have involved generally cohabitation, longer periods of association, associations in which the property that the parties become economically entwined, they share checking accounts or sign on each other's checking accounts. They use each other [sic] credit cards. They share each other's property. There was not any of that sort of activity in this case. So I'm not finding that that would support it.
>
> I don't think that there was any control by either Dr. Rabkin or Ms. Bartlett . . . .

J.A. 153-154. This is a legal analysis, as it (i) expressly determined which factors were relevant, and (ii) did not resolve the factual question of whether the parties had conducted the transaction as if they were strangers. Thus, the Panel majority misperceived the Bankruptcy Court's analysis as factual when it actually was legal.

The Bankruptcy Court subsequently made separate findings as to issues of (a) control (one of the "close relationship" factors), and (b) bad faith, *after* the court had already rejected insider status. *See* Pet. App. 67a. When Respondents point to these factors as supporting the Bankruptcy Court's ruling that Rabkin was not a non-statutory insider, *see* Resp't Br. 6, 13, 21 n.7, Gov't Br. 15, 24, they engage in the very *de novo* review of the full record that they insist is precluded by Rule 52. Respondents' arguments literally prove too much.

D. The Ninth Circuit Did Not Review Legal Aspects of the Bankruptcy Court's Findings *De Novo*.

Respondents' assertion that the Panel majority reviewed *de novo* every "legal" issue that was before it, Resp't Br. 17, Gov't Br. 24-25, is wrong. The Panel majority expressly stated that it reviewed the Bankruptcy Court's findings on *this* issue for clear error and affirmed on that basis: "The bankruptcy court's finding that Rabkin does not qualify as a non-statutory insider is not clearly erroneous." Pet. App. 16a.

E. The Government Mischaracterizes the Case Law.

The Government touts several cases that reviewed "arm's length" findings in other contexts and applied clear-error review, *see* Gov't Br. 19-20, but, in those cases, the issue was a routine factual question of whether a particular understanding of "arm's length" or related issues had been met. Unlike this case, no dispute existed as to what was meant by "arm's length." *See, e.g., Lardas*

v. Grcic, 847 F.3d 561, 568 (7th Cir. 2017) (applying clear-error review to whether debtors "were 'good faith purchasers'" under 11 U.S.C. § 363(m), whose parameters were not disputed), *cert. pet. pending*, No. 16-1508 (filed June 19, 2017); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 86 (2d Cir. 2001) (reviewing for clear error a finding that settlement agreement was negotiated at arm's length; no dispute as to test or relevant factors); *McGee v. O'Conner (In re O'Connor)*, 153 F.3d 258, 261 (5th Cir. 1998) (cursorily addressing facts without discussing test or relevant factors); *Ford v. Allied Mut. Ins. Co.*, 72 F.3d 836, 840 (10th Cir. 1996) (describing a "major issue of fact as to whether" an individual "was in an arm's length relationship" with his insurer; no dispute as to test or relevant factors); *Allen v. Comm'r*, 925 F.2d 348, 351-52 (9th Cir. 1991) (affirming finding that transaction was not arm's length; no legal issue was raised as to test or relevant factors).

II. Respondents Advance the Wrong Analysis for Deciding Mixed Questions of Fact and Law.

As for the broader issue of how mixed questions of fact and law should be resolved, Respondents contend that, unless the issue is purely legal, it is factual and reviewed for clear error. This binary approach ignores the broad middle ground in which a general and abstract term, especially a statutory term, requires further guidance because objective factors have not yet been fleshed out by case law. Under this Court's precedents, that process is predominantly legal and therefore subject to *de novo* appellate review.

A. *Teva* Supports *De Novo* Review.

Reading the Government's brief, one might think that *Teva v. Sandoz* is dead-on authority for Respondents. Far from it. Contrary to the Government's view, *Teva* acknowledges considerable flexibility in mixed-question analysis. The decision, which held that subsidiary factual questions in patent construction are reviewed for clear error, took pains to distinguish ambiguities in written instruments like patents from statutory questions where consistency is required as a matter of public policy. Justice Breyer's majority opinion acknowledged that "this Court has never previously compared patent claim construction . . . to statutory construction." *Teva*, 135 S. Ct. at 840. Although *Teva* was a divided decision, the full Court agreed on this point. *See id.* (Breyer, J., majority) ("Neither do we find factfinding in this [patent construction] context sufficiently similar to the factfinding that underlies statutory interpretation. Statutes, in general, address themselves to the general public; patent claims concern a small portion of that public."); *id.* at 845 (Thomas, J., dissenting) ("The classic case of a written instrument whose construction does *not* involve subsidiary findings of fact is a statute.") (emphasis in original).

A key dispute in *Teva* involved the meaning of an ambiguous patent claim term that was the subject of competing expert opinions. *See id.* at 842-43. As Justice Breyer explained, resolution of competing expert opinions on the meaning of a patent claim is a factual determination, not an issue of law. *Id.* Here, by contrast, the meaning of "arm's length" in the context of the Bankruptcy Code cannot be the subject of expert testimony because it addresses a statutory standard, not

a term of art subject to interpretation by those skilled in the art. As the majority opinion states, "[s]tatutes typically (though not always) rest upon congressional consideration of general facts related to a reasonably broad set of social circumstances; patents typically (though not always), rest upon consideration by a few private parties, experts, and administrators of more narrowly circumscribed facts related to specific technical matters." *Id.* at 840. Generally-applicable determinations thus should be reviewed *de novo*, and case-specific determinations reviewed for clear error. Justice Breyer analogized to *Fenton*, where a district court's determination of the voluntariness of a confession was determined to be a factual determination when it involved a historical fact as to "'whether in fact the police engaged in the intimidation tactics alleged by the defendant.'" *Id.* at 842 (quoting *Miller v. Fenton*, 474 U.S. 104, 112 (1985)). Neither *Teva* nor *Fenton* suggest that the standards for assessing voluntariness also are issues of fact and reviewed deferentially.

In sum, nothing in *Teva* remotely suggests that mixed questions of fact and law regarding a statutory status are factual because they involve subsidiary issues. The Government's reliance on *Teva* is misplaced.

B. This Court Has Consistently Applied *De Novo* Review to Intermediate-Level Questions That Are Predominantly Legal.

Respondents' mistaken reliance on *Teva* demonstrates their broader error: they assume that all subsidiary components of "arm's length" status are factual merely because they are subsidiary factors and are not expressly identified in the statute or legislative history. But an

issue does not become factual merely because of its lower rung on some imaginary hierarchical ladder. If the subject is predominantly legal in nature, it is legal, and here the question turns on selection of the relevant underlying *factors*, and not upon determination of the underlying *facts*, which, it bears repeating, essentially are undisputed. That question of relevance makes the analysis predominantly legal. *See, e.g.*, *Teva*, 135 S. Ct. at 845 (Thomas, J., dissenting) (summarizing *Fenton*'s conclusion that "the more [trial-court decisions] define rules applicable beyond the parties' dispute," the more they are "'analytically more akin to . . . a legal conclusion'") (citation omitted).

As Petitioner's opening brief demonstrates, the Court's "seaman" status decisions confirm that intermediate-level questions of statutory interpretation are legal in nature even where the test in question is not explicitly set forth in the statute or legislative history. In response, Lakeridge shrugs off the issue in a cryptic footnote, cursorily distinguishing the seaman cases as "involv[ing] challenges to the *meaning of the statutory standard*." Resp't Br. 30 n.12 (emphasis in original). But the question here *does* involve the meaning of a statutory standard (insider status under the Bankruptcy Code) and thus is not distinguishable on that basis. As for the Government, its short response amplifies the same error: it quotes a seaman case as acknowledging that the courts "'define the appropriate standard'" (reviewed *de novo*) and the jury "find[s] the facts [that are] relevant under the standard." Gov't Br. 13 (quoting *Chandris, Inc. v. Latsis*, 515 U.S. 347, 369 (1995)). This is exactly Petitioner's point.

In light of the short shrift given by Respondents to the seaman cases, it bears repeating: these cases involve the same type of intermediate subsidiary-level standards clarifying the contours of a legal status as does this case. For example, *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991), construed "seaman" status, an undefined term in the Jones Act, as a matter of law to apply to "vessels in navigation," a term that was not in the statute, which the Court then construed as requiring, as a matter of law, "that an employee's duties must 'contribut[e] to the function of the vessel or to the accomplishment of its mission,'" such that "[i]t is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work." *Id.* at 355. These intermediate-level standards were determined as a matter of law, and only then would the jury decide whether the relevant facts were present. *See Chandris*, 515 U.S. at 369; *Sw. Marine, Inc. v. Gizoni*, 502 U.S. 81, 87-88 (1991); *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 712-14 (1986).

The seaman cases are hardly unique. Circuit courts also review *de novo* the trial courts' determination of the relevant factors for consideration when applying statutory terms. *See, e.g., A & H Sportswear, Inc. v. Victoria's Secret Stores, Inc.*, 237 F.3d 198, 210 (3d Cir. 2000) (applying *de novo* review to district court's selection of its own factors to determine "likelihood of confusion" under the Lanham Act, as "legal principles govern what evidence may, or must, be considered by the District Court in reaching [its factual] conclusion, and also what standards apply to its determination"); *Figter Ltd. v. Teachers Ins. & Annuity Ass'n of Am. (In re Figter Ltd.)*, 118 F.3d 635, 638 (9th Cir. 1997) (noting that, in the context of determining

whether the purchase of bankruptcy claims were in good faith, "[t]o the extent that our review requires us to define the general parameters of a good faith determination, we are reviewing a question of law"); *Mellon Bank, N.A. v. Metro Commc'ns, Inc.*, 945 F.2d 635, 642 (3d Cir. 1991) (explaining that, for mixed questions, "[w]e accept the trial court's finding of historical or narrative facts unless clearly erroneous, but exercise 'plenary revenue of the trial court's choice and interpretation of legal precepts and . . . application of those precepts to historical facts'") (citation omitted).

C. Each of the Court's Four Tests Supports *De Novo* Review.[8]

1. Predominantly Legal Question Test.

The most crucial gap in the briefing is Respondents' failure to explain why the Bankruptcy Court's selection of factors to decide arm's length status—*i.e.*, determining which factors are relevant—is predominantly factual and not normative. Moreover, Respondents never account for the fact that this issue arises in the context of determining the contours of an undefined statutory status.[9] And they

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8. Lakeridge's argument that only a single test exists, with multiple dimensions, Resp't Br. 26 n.10, is largely a semantic quibble. The Court has used these different approaches on various occasions, and it has never renounced any of them.

9. Majority-rule circuit cases refer to the statutory context as a rationale for reviewing non-statutory insider status *de novo*. *See In re U.S. Med., Inc.*, 531 F.3d 1272, 1275 (10th Cir. 2008) ("Here, however, the facts are undisputed and the issue revolves around the legal conclusion drawn from the facts *against the backdrop of a statute*; thus, we have a mixed question of law and

do not address the fact that neither their analysis nor the Bankruptcy Court's discussion correlates with the Panel majority's stated definition for arm's length. Indeed, the core premise of their argument (*i.e.*, that intent and motivation are relevant factors) itself raises a *legal* question. If Respondents are correct that intent played a major role in the Bankruptcy Court's decision, this would provide a compelling example of why *de novo* review is required. Surely, the appellate courts, not individual bankruptcy courts, should decide whether subjective intent can decide insider status.

2. Historical Test.

Respondents' historical analysis fails in multiple ways. First, their comparison of the majority-rule decisions[10] supporting *de novo* review of non-statutory insider status to the minority-rule decisions fails to account for

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fact where the legal analysis predominates.") (emphasis added); *accord Schubert v. Lucent Techs. Inc. (In re Winstar Comm'ns, Inc.)*, 554 F.3d 382, 395 (3d Cir. 2009); *Rupp v. United Sec. Bank (In re Kunz)*, 489 F.3d 1072, 1077 (10th Cir. 2007) ("Because *the basic issue here is one of interpretation of the bankruptcy statutes* and there are no disputed issues of fact, . . . our standard of review is *de novo*.") (emphasis added).

10. Contrary to Lakeridge's contention that no majority rule has emerged, not only do the majority of circuits to address the issue favor *de novo* review, but three Bankruptcy Appellate Panel cases have so ruled as well. *See Stalnaker v. Gratton (In re Rosen Auto Leasing, Inc.)*, 346 B.R. 798, 803 (B.A.P. 8th Cir. 2006); *Miller Ave. Prof'l & Promotional Servs., Inc. v. Brady (In re Enter. Acquisition Partners, Inc.)*, 319 B.R. 626, 630 (B.A.P. 9th Cir. 2004); *Miller v. Schuman (In re Schuman)*, 81 B.R. 583, 586 n.1 (B.A.P. 9th Cir. 1987).

extensive discussion in one of the earlier majority-rule decisions, *In re Krehl*, 86 F.3d 737, 742 (7th Cir. 1996). Second, it ignores the more general historical practice of treating mixed questions of "status," statutory construction, and intermediate-level undefined statutory terms as predominantly legal requiring *de novo* review. Third, Lakeridge repeatedly, but wrongly, declares that this Court has never applied *de novo* review outside of a constitutional context, Resp't Br. 18, 26, 27-29, ignoring *Wilander* and the other cases that have done just that, not to mention *Teva*, which draws the line at statutory vs. non-statutory issues, and *not* at constitutional issues. Finally, Respondents' analysis does not comport with the view of Justices Thomas and Alito that the proper historical timeframe is 1937, when Rule 52(d) was adopted. *See Teva*, 135 S. Ct at 845 (Thomas, J., dissenting). At that time, this Court applied *de novo* review to determinations of ultimate fact. *See Bogardus v. Comm'r*, 302 U.S. 34, 38-39 (1937); *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 491 (1937). *De novo* review thus is the historical practice, for multiple reasons.

3. Functional Test.

In arguing that trial courts are best suited to decide insider status, Respondents again rely on the faulty premise that the question at hand is factual. If that were the case, their functional analysis would have some validity. But the question here is the need for appellate guidance as to how the trial courts should apply a statutory test, not the determination of historical facts under that test. Neither brief addresses the fundamental problem that the characteristics of non-statutory insider status should not vary from one courtroom to the next.

The need for consistent standards is obvious. Not only does the Constitution require uniformity of bankruptcy laws, *see* U.S. CONST. art. I, § 8, cl. 4, but allowing jurisdiction-specific or even judge-specific tests as to whom is an insider is not tenable: as discussed *infra*, it would lead to an arbitrary world where the standards for liability for preferential and fraudulent transfers would depend on the court hearing the case. This is a paradigm case for *de novo* review.

4. Ultimate-Issue Test.

As discussed above, Justices Thomas and Alito's historical analysis makes the Court's fourth test, determinations of ultimate facts, also applicable here.

III. Respondents Ignore the Untenable Consequences from Allowing Disparate Standards for Non-Statutory Insider Status.

Respondents err twice in their discussion of impact. First, they mistakenly posit a world where appellate courts would be saddled with torrents of appeals requiring *de novo* resolution of factual disputes. That dystopian scenario reflects a vivid imagination, not anything that could result here. Second, they never try to justify why allowing widely disparate rulings as to the legal characteristics of a non-statutory insider is an acceptable outcome. For multiple reasons, it is not.

Respondents' projection of dire consequences suffers from the same faulty logic as do their other arguments: they erroneously assume that *de novo* review means that all subsidiary factual determinations would be made by

appellate courts. The issue here is how a legal standard should be applied to the facts and what factors are relevant for that analysis. Appellate courts routinely make such decisions, and they are far less fact-intensive, than, say, reviewing a factual decision for clear error. Respondents' floodgates argument is meritless.

But a real detrimental impact *will* result if Respondents prevail. The Court need look no further than the cases finding insider status despite relationships that are more attenuated than cohabitation, commingling of finances, and the other factors cited by the Bankruptcy Court. In those cases, close friends, non-cohabitating lovers, golfing buddies, business associates, former spouses, and others have been ruled to be non-statutory insiders. *See Browning Interests v. Allison (In re Holloway)*, 955 F.2d 1008, 1011-12 (5th Cir. 1992) (former spouse and friend); *Kaisha v. Dodson*, 423 B.R. 888, 901 (N.D. Cal. 2010) (debtor's former lover was an insider even though relationship ended before the transfer); *Gordon v. Vongsamphanh (In re Phongasavath)*, 328 B.R. 895, 897-98 (Bankr. N.D. Ga. 2005) (friend making undocumented loans but no *de facto* family relationship, romantic involvement, or cohabitation); *Hirsch v. Tarricone (In re A. Tarricone, Inc.)*, 286 B.R. 256, 269 (Bankr. S.D.N.Y. 2002) (golfing buddy and close personal friend); *In re Curry*, 160 B.R. 813, 818 (Bankr. D. Minn. 1993) (very close friend and business associate); *Rush v. Riddle (In re Standard Stores, Inc.)*, 124 B.R. 318, 325 (Bankr. C.D. Cal. 1991) (ex-brother-in-law); *Grant v. Podes (In re O'Connell)*, 119 B.R. 311, 316 (Bankr. M.D. Fla. 1990) (very good friend who made informal loans); *accord Castellani v. Kohne (In re Kucharek)*, 79 B.R. 393, 395-96 (Bankr. E.D. Wis. 1987). Respondents cite no other case that has drawn a

line requiring cohabitation and commingled finances, *inter alia*, to establish insider status.

This disparity in outcomes means that, under Respondents' position, a transferee might be liable for avoidance of preferential or fraudulent transfers in some courts but not in others. Plan confirmation fights, objections to discharge, avoidance actions, claims disallowance and subordination, and even insider transactions subject to state-law challenges also would be affected.

Respondents' silence here is telling. If a transferee can be liable for a preferential or fraudulent transfer based merely upon the debtor's discretionary decision of where to file a petition for bankruptcy (bankruptcy cases do not have personal-jurisdiction restraints due to nationwide service of process), constitutionally required uniform application of bankruptcy law is at risk. Surely a transferee should be able to understand her status and potential exposure when a transfer or payment is made, not months later when the debtor elects where to file for bankruptcy protection.

Appellate review is supposed to prevent wide disparity in legal standards and outcomes. *See Salve Regina Coll. v. Russell*, 499 U.S. 225, 234 (1991) (discussing "the goal of doctrinal coherence advanced by independent appellate review"). Requiring appellate courts to apply *de novo* review here will simply let them do their jobs.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed and the case remanded for *de novo* review of the Bankruptcy Court's decision.

Respectfully submitted,

GREGORY A. CROSS*
MITCHELL Y. MIRVISS
VENABLE LLP
750 East Pratt Street,
Suite 900
Baltimore, MD 21202
gacross@venable.com
(410) 244-7400

KEITH C. OWENS
JENNIFER L. NASSIRI
VENABLE LLP
2049 Century Park E.,
Suite 2300
Los Angeles, CA 90067
(310) 229-9900

Counsel of Record

Counsel for Petitioner